NO. 46385-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JARED SCHAUBLE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Garold E. Johnson, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of appellant's prior convictions under ER 404(b).

2. The court erred in admitting hearsay about the circumstances of appellant's prior convictions in violation of his constitutional right to confront witnesses.

3. Counsel was ineffective in failing to object to inadmissible hearsay pertaining to the circumstances of appellant's prior convictions.

Issues Pertaining to Assignments of Error

1. Under ER 404(b), evidence of prior bad acts is not admissible to show propensity, but may be admissible to show a common scheme or plan. In appellant's trial for third-degree rape of a 15-year-old girl, the court admitted his 2008 convictions for communicating with and possessing sexually explicit photographs of a 14-year-old girl. Did the court err in admitting this evidence over defense objection?

2. The right to confront witnesses under the state and federal constitutions prohibits admission of testimonial hearsay by persons not available for cross-examination under oath. Did the court violate appellant's confrontation rights when it admitted the officer's testimony about statements made by the girl and her mother during investigation of the 2008 offenses? Alternatively, did counsel's failure to object to this

hearsay violate appellant's constitutional right to effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Jared Schauble with three counts of third-degree rape of a child and two counts of unlawful delivery of a controlled substance to a minor with a sexual motivation. CP 16-18. The court dismissed one count of delivery of a controlled substance, and the jury rejected the special verdict on sexual motivation. RP 482, 490; CP 58. On the remaining counts, the jury found Schauble guilty, and the court imposed standard range sentences. CP 25-28, 67. Notice of appeal was timely filed. CP 103.

2. Substantive Facts

a. Schauble's Neighbors

Late one night in February 2013, Schauble went to his neighbors' apartment, apparently distraught over the end of a relationship with 15-year-old K.K.-T. RP 169-72. According to Kyler Phillips, Schauble said he and K.K.-T. had been hanging out, watching television, and he loved her. RP 173-74. He told Kyler and her husband Chase[1] he was very fond of K.K.-T.,

[1] Because Kyler and Chase Phillips share the same last name, first names are used here to avoid confusion. No disrespect is intended.

and he knew his feelings were wrong, but he had done nothing wrong. RP 190. Kyler described Schauble as so upset he could barely speak. RP 172.

Schauble told Kyler he wanted to kill himself or hurt someone because he was so angry at K.K.-T's mother and brother. RP 172-73. He showed Chase the marks on his arms where he had been cutting himself. RP 354-55. He told Chase he was frustrated with K.K.-T.'s mother for not allowing her to hang out with him. RP 356. He was concerned K.K.-T.'s mother was not strict enough. RP 173.

The Phillips, K.K.-T., her family, and Schauble all attended a nearby church. RP 177-78, 191. The Phillips testified Schauble said he was going to kill himself at church on Sunday morning. RP 174, 359. Chase also recalled threats to harm K.K.-T.'s friend and mother. RP 359. Chase testified Schauble demanded that his neighbors resolve this issue that day. RP 361. Because they were friends and he did not really believe Schauble would hurt anyone, Chase waited until the next day and called his pastor, rather than the police. RP 363, 365.

Pastor Higginbotham called K.K.-T.'s mother, and together they confronted K.K.-T. RP 384-86. K.K.-T.'s mother was upset, but did not know what to do. RP 385-87. Higginbotham called 911. RP 295.

b. K.K.-T.

K.K.-T. testified she was 15 when she met Schauble. RP 197-98. Austin, the older brother of a school acquaintance of hers, contacted her one day on Facebook. RP 203. He was Schauble's roommate, and used Schauble's phone. RP 204, 244-45. One day, when she texted Austin, Schauble responded, and the two struck up a friendship. RP 204. She told him she was 15; he told her he was 24. RP 205. After texting a few times during the week, the two agreed to meet at church that Sunday. RP 206. They also stayed for a church social activity: watching the Seahawks football game on the big screen at the church. RP 206-07, 285-86. He told her she was pretty, and the texts became more frequent. RP 207-08. On a Wednesday in early December, when she had only a half-day of school, she and Schauble went to a movie, to Starbucks, and then back to his apartment where they hung out and watched a movie with his friends. RP 208-10. In his studio apartment, his two friends were on the couch while Schauble and K.K.-T. lay on his bed and the couple began kissing. RP 209-10.

After that date, she testified, his texts contained even more compliments and he asked her to delete them from her phone. RP 210. He also asked her to tell his friends she was 18. RP 211. He told her he had been in trouble before for being with a younger girl, but she continued to see him. RP 252. According to K.K.-T., as the relationship became more

serious, Schauble began to behave more like a boyfriend. RP 211-12. The couple went on more dates to the movies, the mall, out to dinner and once to the Zoo Lights holiday display. RP 212.

At some point, K.K.-T. told Schauble she liked to drink alcohol. RP 212. In response, he began to buy it for her. RP 212-13. About three weeks into the relationship, she drank vodka at his apartment, and the two had sex while his friends slept on the couch next to the bed. RP 213-15. She claimed that, over the next few months, they had sexual intercourse with his penis in her vagina eight or nine times, with the last time being the day of the Superbowl, February 3, 2013. RP 216, 221. She claimed he gave her alcohol every time they had sex and once gave her marijuana. RP 217-20.

After spending the night with Schauble the night of the Superbowl without telling her mother, K.K.-T. was grounded and her mother took her phone. RP 224-25. She stayed in contact with Schauble via Facebook, but broke up with him during the week after the Superbowl. RP 226-27. He gave her a ring and a bracelet which she threw away even before the break-up. RP 227, 276. His Facebook messages to her included statements that he loved her, requests that she forgive him, and a request that she, "If nothing more, at least be my friend." RP 232; Ex. 1. On her phone were also photos of alcohol that he sent her. RP 238-39; Exs. 7, 8.

c. 2008 Investigation

Over continuing defense objection, the Court admitted evidence of Schauble's 2008 convictions. RP 158-59. The prosecutor told the court the parties agreed Officer Brent Murray could testify about "the admission in general. We will be able to talk about the who, what, when, where, and why; specific statements that the defendant made." RP 155. Defense counsel proposed a limiting instruction and described the admitted evidence as "the testimony of Woodland Police Officer Murray, and then also the fact of the 2008 conviction." RP 158. He clarified on the record that "even though I have agreed or stipulated that certain evidence come in, that's only because of the court's earlier ruling and we are still objecting to the inclusion of any of this evidence from 2008." RP 159. The court noted the continuing objection. RP 159.

During the first day of motions in limine, defense counsel had moved that all state witnesses be prohibited from relating any out-of-court statements unless the speaker were available for cross examination under Crawford.[2] RP 31. The prosecutor announced he did not anticipate any such problems, and the court granted the motion. RP 31-32. The court explained that, while things can change during trial, "when you get a motion in limine, grant that; that's reliable unless something changes during trial." RP 32.

[2] Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The court explained that, "typically... what changes during trial is somebody opens a door." RP 32. No further discussion of the Confrontation Clause arose during trial.

At the beginning of Murray's testimony, the court instructed the jury it was admitted "only for the purpose of determining whether or not it proves a common scheme or plan." RP 307-08. Murray testified he investigated a case against Schauble in Woodland, about 120 miles south of Tacoma, in 2008. RP 308-10. The victim's mother reported inappropriate contact between Schauble, who was 20 at the time, and her 14-year-old daughter, S.B. RP 312. Murray testified S.B.'s mother told him she told Schauble to stop contacting her daughter, and even told Schauble's parents, who agreed to try to prevent further contact. RP 312-13.

Murray testified Schauble instructed S.B. to give a false name when calling his parents' home, to erase the caller identification information on the phone, and to immediately make another call after speaking to him so that the re-dial function would not go to him. RP 313.

He testified S.B.'s mother asked the phone company to switch her account with her daughter's, so that she began to receive Schauble's text messages. RP 314. After the mother gave Murray her password, Murray was able to print hundreds of emails between Schauble and S.B. RP 314-15. He testified the emails included declarations of love, dreams of cuddling by a

fire and kissing, instructions to use a false name when calling, and compliments on her body. RP 315-18. He testified S.B.'s mother told him of other texts she had seen that were deleted before Murray could see them. RP 324. He described the deleted texts as asking S.B. to send photographs and telling S.B. he could not wait to feel her soft skin against his, kiss her lips and look into her eyes. RP 324.

Murray testified S.B. met Schauble after his 17-year-old girlfriend moved from Tacoma to Woodland, where she became friends with S.B. RP 325. On April 17, 2008, Murray testified, S.B.'s mother called the police because the texts involved a plan for Schauble and S.B. to meet in person for the first time. RP 325. According to Murray, the plan was to meet at a park in Woodland to have sex and possibly go to Canada. RP 326-27. Murray claimed to have seen a flyer Schauble created advertising a party at the park for the end of WASL testing. RP 326-27. According to Murray, the flyer announced there would be a live DJ and exhorted attendees to bring "ass, grass, or cash." RP 327. Murray advised S.B.'s mother to keep her at home, but according to Murray, the mother wanted Schauble caught. RP 330. So Murray and a Department of Corrections officer followed S.B. to the park, where they saw her and Schauble hug, and watched Schauble give her his coat. RP 330-32.

When confronted, Schauble admitted to Murray he knew S.B. was 14, he was attracted to younger girls, and he had come from Tacoma to have sex with her. RP 336-37. He admitted telling her how to hide their communications. RP 337. According to Murray, S.B. said she had brought a condom so that the two could have sex at the party. RP 338. He also admitted he had asked S.B. for, and she had sent, photographs of her in her underwear and without her bra. RP 339-40.

Schauble's statement on plea of guilty, admitted as Exhibit 11, reads "In Cowlitz County, Washington, between April 4 - 18 2008, I knowingly possessed a picture of a minor engaged in sexually explicit conduct and communicated with a person who was 15 years old whom I knew to be 15 years old for immoral purposes of a sexual nature." RP 342; Ex. 11.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING THE 2008 EVENTS AS A COMMON SCHEME OR PLAN.

ER 404(b)[3] is a categorical bar to admission of prior acts evidence to prove the character or propensity. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this rule, evidence of other bad acts

[3] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

must be excluded unless shown to be relevant to a material issue other than propensity and to be more probative than prejudicial. State v. Gunderson, ___ Wn.2d ___, ____ P.3d ___, slip op. at 7 (No. 89297-1, filed Nov. 20, 2014). Evidence of prior bad acts is presumed inadmissible, and the party seeking to admit them bears a substantial burden. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

"Substantial" similarity is required between the prior acts and the charge act before the prior acts will be admitted to establish a "common scheme or plan." Id. at 20. The similarity must demonstrate "conduct created by design" rather than coincidence. State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007). The state failed to meet its burden in this case because the similarities between the 2008 offenses and current incidents nearly six years later are not sufficiently substantial to establish a common scheme or plan. Without sufficient evidence of a non-propensity purpose, the prejudicial effect of the prior convictions mandates their exclusion.

a. Courts Must Use Caution in Admitting Evidence Under the Common Scheme or Plan Exception to the Ban on Propensity Evidence.

Before admitting evidence under ER 404(b), a trial court must complete four steps. The court must (1) find by a preponderance of the evidence the accused committed the prior acts; (2) identify the purpose for which the evidence is to be introduced; (3) decide whether the evidence is

relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

"The trial court must presume that evidence of prior bad acts are inadmissible and decide in favor of the accused when the case is close." State v. Kennealy, 151 Wn. App. 861, 886, 214 P.3d 200 (2009); see also State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009) ("In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence.")

This Court reviews the trial court's interpretation of an evidentiary rule de novo. Gunderson, ___ Wn.2d at ___, slip op. at 5. If the court correctly interprets the rule, its decision to admit or exclude the evidence is reviewed for an abuse of discretion. Id. Nevertheless, "discretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds such as a misinterpretation of an evidentiary rule. Gunderson, ___ Wn.2d at ___, slip op. at 5.

b. The 2008 Incident Was Not Sufficiently Similar to Show a Common Scheme or Plan.

A common scheme or plan exists where an accused devises a plan and repeats it to perpetrate separate but very similar crimes. State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). "Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design." State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999). The commonalities with a prior occurrence need not be unique, but they must be "markedly and substantially similar" indicating, "the defendant has developed a plan and has again put that particular plan into action." Gresham, 173 Wn.2d at 422.

The 2008 incidents were not "markedly and substantially similar" to those of the instant case. Nor did they consist of consistent repetition of "complex common features" to support an inference of an overarching plan. The only plan the two incidents show is one to persuade a young female to have intercourse. This is mere propensity, not common scheme or plan.

For example, in the companion case to Gresham, Scherner was convicted of child molestation based on evidence he fondled his granddaughter's genitals while on a family trip. Id. at 414-15. Evidence was admitted under ER 404(b) that he had also fondled the genitals of another granddaughter and a family friend, also while on trips and two nieces at

night while their families were staying in his home. Id. In each case, the incidents occurred while the other adults in the home were asleep. Id. The court found this was sufficient similarity to admit the prior incidents in Scherner's trial as different manifestations of the same plan. Id. at 422-23. Small differences, such as whether there was oral sex in addition to the fondling, did not overcome the similarities of the incidents. Id. at 423.

The two incidents in this case show none of the marked and substantial similarities illustrated in Scherner's case. In each case, Schauble met a young girl through a mutual acquaintance and used common means of communication such as texting and Facebook to establish a relationship. These traits are ones shared by many if not most relationships. The similarities are neither marked, nor substantial.

The differences, on the other hand, are striking. K.K.-T. was someone Schauble regularly saw at church and who lived in the same town. RP 206-07, 221. The two met frequently and were essentially dating. RP 212, 221. The State's evidence showed regular vaginal intercourse. RP 216, 221. By contrast, his relationship with S.B. was a long-distance one while he lived in Tacoma and she in Woodland. RP 325. No sexual contact occurred, and the two did not even meet in person until the day of Schauble's arrest. RP 325.

The court erred in relying on the similar ages of K.K.-T. and S.B. because age is an element of the current offense. See RCW 9A.44.079 ("A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old."). The age similarity fails to show a common scheme or plan; it shows a mere propensity to commit rape of a child in the third degree. If the elements of the crime were sufficient to show a common scheme or plan, then every prior incidence of the same offense would be admissible as a common scheme or plan. This would defeat the purpose of the narrow exceptions to ER 404 (b). The commonality must be a fact that is not already inherent in the crime.

This case is more akin to State v. Slocum, ___ Wn. App. ___, 333 P.3d 541, 545-46 (2014), where Division Three of this Court held that the trial court abused its discretion in admitting prior incidents that merely showed a "plan to molest children." The court noted that the charged offense alleged ongoing molestation over years, while the prior incidents involved allegations only of isolated incidents. ___ Wn. App. at ___, 333 P.3d at 549. In terms of Slocum's relationship to the victims, the court explained, "The evidence establishes only that in the case of all three victims, they were young, Mr. Slocum was an adult, and there was a family relation by marriage." ___ Wn. App. at ___, 333 P.3d at 549. Finally, the

court declared that merely seizing an opportunity when one would not be seen was "too unlike" a proactive plan to isolate a victim. ___ Wn. App. at ___, 333 P.3d at 550. The only two incidents the court found sufficiently similar to be manifestations of a common plan were incidents in which Slocum allegedly invited girls to sit with him in his recliner and then rubbed their crotches or vaginal areas. ___ Wn. App. at ___, 333 P.3d at 550.

Like the majority of the prior incidents in Slocum, the 2008 incidents in this case should have been excluded. The evidence shows only two incidents in which mutual acquaintances provided Schauble with an opportunity to get to know a young girl, and he used everyday routine methods of communication to take advantage of that opportunity. That is not a common scheme or plan.

c. Admission of the 2008 Events Prejudiced Schauble by Allowing the Jury to Convict Him Based on Propensity.

Evidentiary error is prejudicial when, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." Id. Admission of the 2008 incident prejudiced Schauble because the State relied on this evidence in closing

argument and the jury was unlikely to be able to set aside the natural inclination to infer propensity.

Courts must err on the side of excluding prior bad acts because of the extreme danger of unfair prejudice: "Evidence of a criminal defendant's prior bad acts 'is objectionable not because it has no appreciable probative value but because it has too much.'" Slocum, ____ Wn. App. at ____, 333 P.3d at 543 (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 58.2, at 1212 (Peter Tillers rev. ed.1983)). The potential for unfair prejudice is "'at its highest'" in sex offense cases. Slocum, ___ Wn. App. at ___,333 P.3d at 543-44 (quoting Gresham, 173 Wn.2d at 433.

"ER 404 is intended to prevent application by jurors of the common assumption that 'since he did it once, he did it again.'" State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990); see also 5 Karl B. Tegland, Wash. Prac., Evidence § 404.10, at 498 (5th ed. 2007) (evidence of prior felony convictions is generally inadmissible because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty). When the jury is likely to make that assumption, reversal is required. See State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445 (2001) (Court violated the purpose of ER 404(b) because "[a]fter hearing the witnesses' testimony

and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief.")

The recitation of the 2008 incident was particularly prejudicial in this case because it included Schauble's alleged admission that he was attracted to younger girls. RP 337. This statement is strong propensity evidence that the jury was unlikely to be able to disregard, even in light of the court's instruction that the prior incident was only to be considered in determining whether there was a common scheme or plan. During rebuttal closing argument, the prosecutor specifically brought up Murray' testimony that Schauble told him he was attracted to younger girls. RP 554. This comment reinforced and focused the jury's attention on the propensity aspect of this evidence and made it even more unlikely the jury could follow the court's limiting instruction. Schauble's conviction should be reversed for improper admission of damaging propensity evidence.

2. SCHAUBLE'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN THE COURT ADMITTED TESTIMONIAL HEARSAY ABOUT THE 2008 INCIDENT.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. Const. amend. 6;[4] Const. art. 1, § 22;[5] Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); State v. Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012). Since a "witness" is defined as a person giving testimony, an accused person's constitutional right to confront witnesses prohibits introducing out-of-court statements that are "testimonial" in nature without actual confrontation and cross-examination. Crawford, 541 U.S. at 53-54. Confrontation clause violations are reviewed de novo. Jasper, 174 Wn.2d at 108. Even if the 2008 convictions were admissible under ER 404(b), Schauble's convictions should be reversed because the admission of testimonial hearsay by S.B. and her mother violated his constitutional right to confront witnesses.

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[4] The Sixth Amendment to the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Fourteenth Amendment makes this right binding on the states. State v. Lee, 159 Wn. App. 795, 814, 247 P.3d 470 (2011).

[5] Article I, section 22 of the Washington Constitution provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

a. S.B.'s and Her Mother's Statements and Reports to Police Are Testimonial Hearsay.

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford 541 U.S. at 68-69. Crawford does not definitively explain the scope of "testimonial evidence." Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford, 541 U.S. at 68. But the Court set out the "core class of 'testimonial' statements" to which the confrontation right applies. Crawford, 541 U.S. at 51-52.

The "core class" includes formal affidavits and confessions to police officers, as well as "pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. Included are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. Testimonial statements also include those made to a police officer in the course of an investigation, although they need not be made as part of a formal interview or official interrogation. Id. at 52, 53 n.4. A "recorded statement knowingly given in response to structured police questioning" is also testimonial. Id. at 53 n. 4.

By contrast, statements are generally nontestimonial when circumstances objectively indicate the primary purpose is to enable police assistance to meet an ongoing emergency. Davis, 547 U.S. at 822. The Court continued, "[t]hey are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. Murray's testimony included numerous testimonial out-of-court statements by S.B. and her mother.

Murray testified S.B.'s date of birth was 8/31/1993. RP 311. Murray testified Schauble was aware of S.B.'s age because, "Mom made it very clear." RP 320. He testified S.B.'s mother reported "inappropriate communication between her daughter and Mr. Schauble." RP 312. He testified, "[S]he had tried to put a stop to it, but it continued in secret and behind her back and against her wishes. She even contacted Mr. Schauble and told him: My daughter is 14, you're 20. You need to knock this off." RP 312. He testified, "She personally talked to him, told him to knock it off." RP 312. Murray also testified about S.B.'s mother's communication with Schauble's parents: "Then she talked to his parents and his parents agreed to assist in stopping this communication." RP 313.

Murray testified that, before he became involved in the case, S.B.'s mother called the phone company so Schauble's messages to her daughter would come to her instead. RP 314. He then told the jury about "part of the mom's written statement" and "the messages that she wrote down that she was receiving" including "I'm home," "I love you, "Yeah, my phone being gay," "Are you still going to message me or are you mad at me for something?" and "Okay, I thought you were mad at me or something." RP 315-16.

Murray continued reading, apparently from the mother's written statement, the following messages: "I'll try to text you faster when I get back," "I love you, beautiful," "Okay, have fun," "Love you," "We'll have to go soon," "I love you more," and "Sitting her thinking about you and the dream I had last night." RP 316. Murray testified, "These are all from Mr. Schauble's phone." RP 316. Murray continued reading the messages: "It was a good dream," "We were cuddling in front of a fire," "Candle-lit dinner, then laid down on the couch and cuddling to watch a movie. Then I started a fire in the fireplace," "We just held and kissed each other. It was really nice." RP 315-17.

Additional messages included: "Can you call me from a friend's phone?" "Say you're Nickie, though," "I like strip poker, LOL, not

always, I lose," "Not even movie stars have bodies as good as yours and you have a face to go with it, which is awesome." RP 317-18.

Regarding the dates of the 2008 incidents, Murray testified about S.B.'s mother's statements to him: "Mom is reporting that they started communicating with each other on April 4th, 2008. So I don't know if she's looking back through text messages or whatever. But the beginning date of the communication between the two of them, that she knows about, is April 4th. That's on the first page of my report." RP 322-23.

Murray also testifies about S.B.'s mother's notes: "And in her notes here, she told him that he is too old to be calling and told him he is not to be in contact with her anymore. Basically she's telling him to stop it." RP 323-24. He testified, "On 4/8 talked to the – it's blacked out here. 'Nicole dad about him, calling my daughter.' I think it's the girlfriend's dad that she talked to, to find out the communication, who he is. And then she talked to [Schauble's] mom and asked her to have him call." RP 324.

Finally, Murray testified about S.B.'s mother's statement discussing messages that were deleted before Murray could see them. RP 324. These included requests for pictures, "Do you still want to do what we talked about?" and "I can't wait to hold you close, feel your soft skin against mine," and "I can't wait to kiss your soft lips and look deep into your blue eyes to eternity." RP 324.

The prosecutor then asked Murray, "Now, did the mom give background as to how the defendant met S.B.?" RP 325. Murray then recited how S.B.'s 17-year-old friend used to live in Tacoma and dated Schauble, and S.B. came into contact with Schauble via his former girlfriend. RP 325.

The prosecutor then asked, "On page 75, did the mom give an indication of instructions the defendant gave her regarding how to store his info in her phone?" RP 325. Murray replied, "It talks about how beautiful she is. Tells her to store his information in her phone as 'Joey,' and that he will text her as 'Jay.'" RP 325-26.

Murray also testified, "On the 17th, there's communication – and this is when mom reports it to us, because mom started getting scared when they were talking about meeting in person." RP 325. According to Murray, he advised S.B.'s mother to keep her daughter home. RP 330. Instead, she allowed S.B. to go to the park to meet Schauble, with police officers following, saying, "I want this guy caught." RP 330. Murray also related S.B.'s statement that she had brought a condom so that the two could have sex at the party. RP 338.

All of the above testimony related statements made out of court by S.B. and her mother to law enforcement officials. Neither S.B. nor her mother testified or were otherwise available for cross-examination.

Murray necessarily lacked personal knowledge of most, if not all, of the above discussed testimony, particularly the deleted messages, S.B.'s mother's notes, and S.B. and her mother's verbal assertions to Murray and other parties.

All of S.B.'s and her mother's statements to Murray were made in the context of a criminal investigation, not an ongoing emergency. If the notes and reports to police were not enough, the statement by S.B.'s mother that she wanted Schauble caught demonstrates her purpose was to provide evidence against Schauble. She not only understood but also expected that her statements would be used prosecutorially. Therefore, the statements are testimonial hearsay and their admission at trial violated Schauble's right to confront the witnesses against him. Crawford, 541 U.S. at 51-53.

b. The State Cannot Prove the Denial of Schauble's Right to Confront Witnesses Was Harmless Beyond a Reasonable Doubt.

A violation of the Sixth Amendment right to confront witnesses requires reversal unless the State can prove beyond a reasonable doubt that the error did not impact the outcome of the case. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 517 L. Ed. 2d 705 (1967)). The State cannot do so here. As discussed above, the danger that a prior incident will unfairly

influence the jury is already extremely grave in sex offense cases. Slocum, ___ Wn. App. at ___, 333 P.3d at 543-44 (quoting Gresham, 173 Wn.2d at 433). Officer Murray's testimony supplied detail about the 2008 incidents that was both likely to influence the jury's verdict and not otherwise admissible. For example, he claimed S.B.'s statements made clear Schauble was aware of S.B.'s age. RP 311, 320. The jury was also likely to be influenced by the statements that S.B.'s mother and had already confronted Schauble and told him to stop. RP 312, 323-24. And some of the most inflammatory messages presented were ones that Murray had only heard about because they had been deleted before they could be shown to him. RP 324. Where there was no direct evidence of sexual activity, it cannot be ruled out that this type of inflammatory testimonial hearsay influenced the jury's verdict.

c. Review Is Warranted Because Counsel's Motion in Limine Preserved This Issue for Appeal and the Confrontation Clause Violation Is Manifest Constitutional Error.

This error was preserved for appeal because the court granted Schauble's motion in limine prohibiting out-of-court statements in violation of the Confrontation Clause. RP 31-32; CP 21. Counsel apparently agreed that, if the prior incident was admissible under ER 404(b), the judgment and sentence, the guilty plea, and Murray's

testimony about the incident would be admissible. RP 155-56. But there was no indication during pre-trial discussions that Murray's testimony would include testimonial hearsay statements by S.B. and her mother. On the contrary, when counsel moved to exclude hearsay statements under Crawford, the prosecutor assured the Court that would not be a problem. RP 31-32. However, if this Court finds the error insufficiently preserved, it should nonetheless be considered as manifest error affecting a constitutional right under RAP 2.5(a).

An error qualifies as manifest error affecting a constitutional right when the error is constitutional and actually affected the defendant's rights at trial. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d (2014). There must be "a plausible showing that the error resulted in actual prejudice, which means that the claimed error has practical and identifiable consequences in the trial." Id. The court also considers whether the error is one that could have been foreseen by the trial court. Id.

For example, when the court admits statements by a witness who does not testify and the statements corroborate the testimony of a "shaky" state witness, the error is manifest, constitutional, and reviewable under RAP 2.5(a)(3). State v. Lee, 159 Wn. App. 795, 813-14, 247 P.3d 470 (2011). Here, S.B.'s mother did not testify, and her statements tended to make more credible the testimony not only of Murray but also of the

complaining witness in this case, K.K.-T. The confrontation clause violation had the practical and identifiable consequence of permitting the jury to hear S.B.'s mother's prejudicial statements, as discussed above, and deprived Schauble of the ability to test the reliability and credibility of those statements in any way. This was manifest constitutional error that warrants review for the first time on appeal under RAP 2.5(a)(3).

d. If the Confrontation Clause Violation Cannot Otherwise Be Raised on Appeal, then Schauble's Attorney Was Ineffective.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons

supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. See State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel's deficient performance permitted Schauble to be prejudiced at trial by damaging inadmissible hearsay in violation of his confrontation rights. If that performance also prevents this Court from otherwise remedying the issue on appeal, Schauble's conviction should, nonetheless, be reversed for violation of his right to effective assistance of counsel. Allen, 150 Wn. App. at 316-17.

It was unreasonably deficient to permit inadmissible hearsay to be used against Schauble at trial because there was no valid tactical or strategic reason to permit the jury to hear S.B.'s and her mother's statements through the lens of Murray's testimony without even the opportunity to challenge them via cross-examination. Counsel's standing objection to the 2008 incident shows he appreciated how damaging this evidence was. RP 159. His motion in limine shows he was aware of, and concerned about, the potential for Confrontation Clause violations. RP 31-32; CP 6. Thus, there was no possible reason not to object when

Murray's testimony repeatedly violated the scope of the ruling in limine and unfairly expanded the nature of the damaging evidence of the prior incident.

This is not a case where counsel was merely trying to avoid further emphasizing damaging evidence. Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404 (b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). But the inadmissible hearsay in this case was not a brief mention that a jury might not otherwise notice. It formed a substantial part of Murray's testimony about the circumstances of the prior incident that was relied on to show a common scheme or plan. RP 310-25, 330-31. Because this case hinged on the credibility of the complaining witness, the out-of-court statements that enhanced the details of the 2008 incident was reasonably likely to have affected the jury's verdict.

Given Schauble's continuing objection and the ruling in limine prohibiting out-of-court statements by persons not present testifying, the confrontation clause violation testimony should be deemed preserved for

appeal. However, if this Court should conclude it was not, then counsel was ineffective in failing to protect his client's right to confront witnesses.

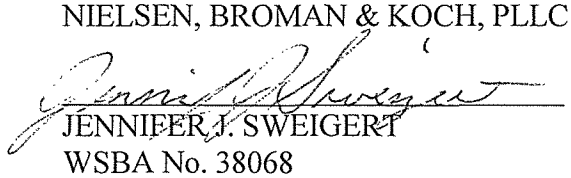
D. CONCLUSION

Because Schauble's trial was tainted by inadmissible evidence of prior bad acts, substantial parts of which were admitted in violation of his constitutional right to confront witnesses, Schauble requests this Court reverse his convictions.

DATED this 25th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46385-7-II
	)	
JARED SCHAUBLE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JARED SCHAUBLE
DOC NO. 319878
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONELL, WA 99322

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 25, 2014 - 2:11 PM

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Court of Appeals Case Number: 46385-7

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